United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket No.

75-7652

IN THE UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

B

P/S

DONALD M. KINSELLA,

Appellant,

-against-

BOARD OF EDUCATION OF THE CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

DOCKET NO.

75-7652

Appellees.

APPEAL FROM ORDERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

BERNARD F. ASHE, ESQ.
IRA PAUL RUBTCHINSKY, ESQ.
80 Wolf Road
Albany, New York 12205
Tel. No. 518-459-5400
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

A. Table of Cases

IN THE UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

DONALD M. KINSELLA,

Appellant,

-against-

BOARD OF EDUCATION OF THE CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

DOCKET NO. 75-7652

Appellees.

APPEAL FROM ORDERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from the decision and order of Hon. John T. Curtin, United States District Judge, dated October 21, 1975 and reported at 402 F. Supp. 1155.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the subsequent state action present issues requiring supplementary federal relief?

2. Was the allegedly remedial state action taken subsequent to the decision of the three-judge federal panel in conformity with the decision of that court?

3. Should the district court have reconvened the three-judge federal court to consider these matters?

4. Were the actions taken by the defendant board in discharging Mr. Kinsella in conformity with the due process requirements of the United States Constitution?

STATEMENT OF THE CASE

A. Nature of the Case

An action, pursuant to 28 U.S.C. §1343(3), 2281 and 2284, and 42 U.S.C. §1983, seeking the convening of a three-judge federal panel to consider the constitutionality of New York Education Law §3020-a was commenced on behalf of plaintiff against whom employment discharge proceedings has been brought pursuant to the statute in question. A preliminary injunction was sought and obtained pending the hearing and determination of the matter by a three-judge panel. The three-judge panel met and subsequently decided that a permanent injunction should issue restraining the defendants from enforcing New York Education Law §3020-a by reason of constitutional deficiencies found in that statute. The injunction was to continue pending the implementation of appropriate remedial action curing the constitutional defects.

Subsequent to that determination, the defendant Commissioner of Education proposed and the State Regents adopted new rules purporting to remedy the statutory defects. Thereafter, the dismissal proceedings against Mr. Kinsella, previously enjoined, were once again undertaken. A final determination discharging Mr. Kinsella was made by the defendant board of education.

The order and judgment appealed from denies each of two motions made on behalf of the plaintiff seeking supplementary relief pursuant to 28 U.S.C. §2202.

Motion I is addressed to the remedial state action taken subsequent to the decision of the three-judge federal court. The motion challenged the rehabilitation of the statute by the adoption of regulations, and therefore, urged that the injunction imposed by the three-judge federal panel was in full force and effect with respect to this plaintiff. The court was being asked to reaffirm the injunction and declare the subsequent action of the board of education in prosecuting the tenure hearing dismissal proceeding against the plaintiff as void.

Motion II is addressed to the constitutional due process defects contained within the tenured teacher dismissal proceeding when compared to the determination made by the U.S. Supreme Court in Arnett v. Kennedy, 416 U.S. 134 40 L. Ed. 2d 15 (1974), as well as other due process cases, including the three-judge decision in the instant case.*

The relief sought in the district court was the determination by the court of the issues raised in plaintiff's motions, or, in the alternative, the reconvening of the three-judge court to consider the state action taken

---

*Since there was no appeal from this decision, it is the law of this case.

subsequent to the imposition of the first injunction. The district court denied the relief sought in each motion.

B. Statement of Relevant Facts

Prior to his discharge, Mr. Kinsella was a tenured teacher employed by the defendant board of education as a physical education and health instructor for a period of fourteen years. During March, 1973, one of the principals employed by the school district (Dr. James M. Haught) filed charges against Mr. Kinsella (A-12, 13)* pursuant to New York Education Law §3020-a(1) (McKinney's Consolidated Laws of New York c. 16) (A-235 through 237).

The defendant board of education thereafter determined that probable cause existed for the charges lodged, and, thereafter, a copy of the charges were forwarded to Mr. Kinsella (A-12, 13). Mr. Kinsella, pursuant to Education Law §3020-a requested a hearing but, prior to the commencement of the hearing, an action was commenced in the United States District Court for the Western District of New York by Mr. Kinsella against the board of education and the Commissioner of Education claiming violations of the equal protections clause of the Fourteenth Amendment to the Constitution. (See Complaint, A-2 through 9.) A temporary restraining order was sought and obtained by

---

*References to pages of the Appendix are proceeded by the letter "A".

Mr. Kinsella preventing the conducting of the tenure hearing (A-29, 30).

Ultimately, a three-judge panel was convened, pleadings were filed, oral argument was obtained (A-53 through 137) and the court rendered its decision (A-138 through 151; A-161 through 167; 378 F. Supp. 54). A permanent injunction was issued. Vacatur of the injunction was conditioned upon "...approprate administrative or legislative action [being] taken to remedy the defects in the procedures here involved" (378 F. Supp. 60; A-163).

Almost immediately thereafter (within eight days), the Department of Education, through the Commissioner of Education and the Board of Regents, proposed, ratified and adopted the rules and regulations which were presented before the court in the motions for supplementary relief. (The amendments to the rules and regulations in issue may be found at A-171; see also A-215.)

There was no appeal from the decision of the three-judge federal panel. Thereafter, the defendant Commissioner of Education ordered the continuation of this tenure hearing which had been postponed indefinitely as a result of the decision of the three-judge federal panel in the instant case (A-170). The tenure hearing against plaintiff was then resumed (A-172). The plaintiff participated in the tenure hearing which was held before a group of three educator-factfinders not employed within or by the district

in accordance with Education Department regulations. After completion of the hearing, a panel recommendation was issued (A-175, infra.) and thereafter the board of education rendered its determination (A-179, infra.).

The motions presented to the district court were made pursuant to Title 28, U.S.C., Federal Rules of Civil Procedure, Rule 7(b) which were brought on by the plaintiff pursuant to 28 U.S.C. §2202. Mr. Kinsella sought a further necessary determination by the district court or by an appropriately constituted three-judge federal panel compelling continued compliance with the order and injunction of February 19, 1974. The briefs containing all of plaintiffs substantive arguments in connection with these motions may be found at A-201 through 284 and A-293 through A-322.

Plaintiff contends that jurisdiction over all of the parties for purposes of these motions is based upon the service of the original process commencing the initial action. Motions were orally argued before Judge Curtin (A-323 through 356). Judge Curtin's decision denying the motions may be found at A-357 through 371.

This appeal is from the order and judgment based upon that decision.

SUMMARY OF ARGUMENT

1. Federal jurisdiction exists, as it did from the inception of the action, by reason of the violation of plaintiff's due process rights.

2. The three-judge federal panel found violations of plaintiff's due process rights inherent in the state statutory scheme which provides for disciplinary proceedings applicable to tenured teachers, and:

A. the state action taken in purported compliance with the directions of the three-judge court was not "appropriate" action within the meaning of that term as used by the three-judge federal panel, and, therefore, the injunction issued by that court is still viable and subject to enforcement by the United States District Court for the Western District of New York, or, in the alternative,

B. the state action, even if proper and lawfully followed, fails to provide due process protection enumerated in judicial holdings of the United States Supreme Court as well as in the decision of the three-judge federal panel in the instant action.

POINT I

FEDERAL JURISDICTION EXISTS FOR THE PURPOSE OF ENTERTAINING PLAINTIFF'S MOTIONS FOR SUPPLEMENTARY RELIEF.

The "predicate" or vehicle by which plaintiff seeks further relief in this Court is 28 USC §2202. Powell v. McCormack, 395 U.S. 486, 499 (1969). The purpose of the statute is to provide the court with "residual power" so that further relief based upon the declaratory judgment may be granted. Marks v. Harris, 255 F. 2d 518 (2nd Cir., 1958), cert. den., 358 U.S. 831; Vermont Structural Slate Co. v. Tatko, 253 F. 2d 29 (2nd Cir., 1958). No express reservation of judicial control over the litigants or the cause need be shown. See Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 58, 65 (7th Cir., 1939). Another Court stated the proposition this way:

> "it may fairly be said, therefore, that implicit in a suit for declaratory relief is a prayer for supplemental injunctive relief, if necessary to protect the plaintiff's rights." Holmes v. Government of Virgin Islands, 270 F. Supp. 715, 717 (1974).

In the case sub judica, the three-judge panel found jurisdiction and issued an injunction in furtherance of its declaratory judgment that New York Education Law §3020-a was unconstitutional until:

> "...appropriate administrative or legislative action is taken to remedy the defects in the procedures involved." Kinsella v. Board of Education, 378 F. Supp.,60 (A-167) (Emphasis supplied.)

Petitioner interprets those words to mean that in the absence of appropriate remedial action having been taken, the injunction is still in full force. Also implicit in the word "appropriate" is the presumption that the action taken by the State to rehabilitate New York Education Law §3020-a would have to be lawful and regular.

Petitioner seeks a judicial determination as to whether the injunction issued by the federal courts has been lifted, or, as plaintiff contends (and as a necessary result of the failure to properly promulgate rules) the injunction is still valid. This is the thrust of Motion I. Rather than dealing with the substance of the motion, the District Court decided that the issues were not pendent to the federal action originally decided, and, therefore, it dismissed the motion. The conclusion reached was that no federal jurisdiction existed to entertain the motion because there was not one constitutional case presented.

Judge Curtin applied the doctrine stated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (cited in this brief as Gibbs) to support the contention that no independ-

ent federal jurisdiction exists in the instant case, and therefore, no supplementary relief could be granted. In Gibbs, the Supreme Court enumerated bases for finding pendent jurisdiction. Where both state and federal issues constitute a single "case," then pendent jurisdiction should be exercised. (383 U.S., 725). The facts in Gibbs, and the procedural framework of that case distinguish it from the instant case. In Gibbs, the federal court was presented with federal causes of action as well as claims under state law. The appeal was before the Supreme Court for determination of whether or not the District Court had erroneously heard, and decided, state issues. Procedurally the Gibbs case was an appeal from a trial verdict. Thus, the question of jurisdiction, decided by the trial court, was properly before the Supreme Court on the appeal. The same is true in Hurn v. Oursler, 289 US 238 (1933) and virtually all of the many cases researched with respect to this issue. In each case, the issue of jurisdiction was properly reviewable.

By contrast, in this case, the issue of jurisdiction has already been determined. That determination is the law of this case. Judge Henderson, in his order granting a temporary restraining order (A-29, 30), as well as in the decision requesting the convening of a three judge panel pursuant to 28 USC 2284 (A-41), concluded that there was federal jurisdiction.

Jurisdiction is also presumed in the decision of the panel itself (A-138 through 147). That decision was not appealed, and thus the determination as to jurisdiction is the law of this case. Federal jurisdiction existed at the time the three judge panel acted and continues to exist. There has been no change in the issues presented. The basis for originally bringing the action may be found in the complaint which asserts the denial of due process (A-5, 6, 7); charges which are properly before a federal court. The factual situation may have changed with time, however no fact which can be characterized as "essential" has changed, and, thus, the district court should have bound itself to the "law of the case."

The Gibbs case is further distinguisable from the instant case by reason of the apparent dichotomy that exists in the state and federal causes of action found in Gibbs, and the lack of any such dicotomy in Mr. Kinsell'a case. In "Gibbs" a federal claim was founded on an alleged violation of a federal statute (Taft-Hartley Act) while a separate cause of action was based upon Tennessee contract law (383 US 720, 721). The claims arose out of "...the same nucleus of operative facts and reflected alternative remedies." (383 US, 728). In the instant case plaintiff neither alleges nor attempts to prove his right to any state remedy. The right asserted is the right to have the federal court which granted the injunction to Plaintiff determine the present status of that injunction.

Mr. Kinsella, by returning to the federal courts does not seek a separate or independent unrelated and subsequent determination of a state claim as was the case in "Gibbs," but instead, seeks a judicial decision as to the status of the injunction previously granted to him by the federal court. More analagous to Mr. Kinsella's present procedural status than the Gibbs case would be an instance where a federal judgment has been rendered and the party in whose favor the judgment was rendered seeks to obtain enforcement of that judgment in federal court.

This writer has not found a case analogous to the instant matter. However, certain cases do warrant discussion in relation to the issues before this court. In Consumer Party v. Tucker, 364 F. Supp. 594 (1973) the court considered an application for a temporary or final injunction based upon a previous three-judge federal panel holding that a provision of state law was unconstitutional.

The court, in its findings of fact indicated that the parties, issues of Constitutional Law and essential facts were the same as those in the prior case, and, as a result, the court went on to reach the same conclusion that:

> "The statute held in 1972 by a federal court of competent jurisdiction to be unconstitutional and void as to the plaintiffs, including the plaintiffs Consumer Party and Max Weiner, among other plaintiffs, and the class which they then represented

> and which statute has not been amended in any respect since the date of that judgment, continues to be unconstitutional and void as to the plaintiffs Consumer Party and Max Weiner and the class which they represent." (Id., 364 F. Supp. 604.)

In that case the statute in question had not been amended. The court noted, however, that even if there had been an amendment, the court would have the power to pass upon the merits of the statute:

> If the legislature of the Commonwealth of Pennsylvania had responded to the expectations of the Middle District Court, which anticipated that the Pennsylvania Legislature 'will enact a new and reasonable provision for circulation of nominating papers by political bodies in years subsequent to 1972,' 347 F. Supp. 1, 4, and had enacted a new filing date for nomination papers of independent political bodies, this Court might be required to pass upon the constitutionality of such a new date, but in that the legislature has failed to take any action whatsoever, this Court will continue the relief granted by the Middle District Court as to the year 1972 by granting identical relief as to the year 1973 and all succeeding years, until the legislature does so act." (Id., 364 F. Supp. 602.) (Emphasis supplied.)

This is true because the underlying issue, that of constitutionality, existed in that case. The same holds true in the instant case. The fact that state action was taken is important only insofar as it relates to the basic issue of due process. If federal judicial interpretation is required, it is only in relation to the due process

issue properly before the Court.

It is submitted that the court has now the same parties which were before the three-judge court which rendered the decision declaring New York Education Law §3020-a unconstitutional. The court continues to have these parties before it for jurisdictional purposes by reason of the initiating of the original action and by reason of the continuation of an injunction. As noted earlier, this jurisdiction is of a continuing nature. In Mann v. Davis, 213 F. Supp. 577, aff'd. 377 U.S. 678, on remand, 238 F. Supp. 458, aff'd. 379 U.S. 694, jurisdiction was retained by the court pending a "constitutionally valid" action by the state. By retaining jurisdiction, the court maintains an element of control over the type of action to be taken. See also Jonas v. Hearnes, 246 F. Supp. 70 (1965). The test, in any, that should be applied here can be stated as follows:

1. Are all the parties involved before the court?

2. Is the action contemplated in furtherance of, and based upon, the declaratory judgment previously rendered?

See Hobson v. Eaton, 327 F. Supp. 74 (1970). All of the parties are before the court. The action contemplated, affirmation or vacature of the injunction, is based upon

the declaratory judgment of the three-judge court. The action contemplated is in furtherance of and based upon a declaratory judgment previously rendered. The district court should have determined Motion I on the merits.

POINT II

PLAINTIFF CONTINUES TO BE DENIED DUE PROCESS.

In the District Court decision, Judge Curtin dismissed out of hand the contention raised by the plaintiff that the procedures followed and conclusion reached by the employer in the instant matter failed to comply with the determination of the three judge court. Judge Curtin indicated that the issue did not raise a substantial constitutional question. (A-368) However, as noted in Point I of this brief, there is no requirement that a substantial federal question be raised in order to obtain supplemental relief. Even if there were a requirement that a substantial federal question must be presented in order to obtain supplemental relief as requested by the plaintiff, Judge Curtin should have heard and determined the question of compliance with the decision of the three judge court. The failure to comply with the due process requirements set forth in the three judge panel decision is prima facie a denial of due process.

The three judge panel found the statute unconstitutional on two grounds. First, Education Law §3020-a allowed the board of education, which ultimately determined the question of guilt and penalty, if any, to entertain factors not presented in the record. With respect to that defect, the

court stated:

> "Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on ex parte evidence." (378 F. Supp. 60; A-145).

The second defect in the statute found to be of constitutional proportions by the federal panel was that the board of education was not required to prepare a written decision "...setting forth it's reasoning and the factual basis for its decision" (id. 60; A-145). These two grounds constituted the basis for determining the statute unconstitutional. Since there was no appeal from the decision of the three judge court, the reasoning and the holding of that court constitute the "law of the case", and is binding upon all the parties before that court and, consequently, binding upon the parties before the court on the motion for supplemental relief.

The rules and regulations adopted by the Department of Education (A-215) subsequent to the decision by the three judge federal panel were an attempt to rehabilitate the unconstitutional statute by curing the constitutional defects. Yet, assuming for the purpose of argument that these Rules and Regulations were valid, the plaintiff has still been denied his constitutional right to due process - despite the fact that those due process rights were specifically

enumerated by the three judge panel and despite the fact that those rights were intended to benefit Mr. Kinsella personally!

A comparison of the charges originally brought against Mr. Kinsella (A-12, 13) with the Panel Report rendered by the Hearing Panel (A-175, infra) and the ultimate determination of the Board of Education (A-179, infra) clearly highlights the lack of due process manifest in this case. The statement of charges against Mr. Kinsella (A-12, 13) is subdivided into five specifications. These specifications were voted upon and unanimously carried by the Board of Education in its determination of probable cause for the charges against Mr. Kinsella. The first specification, consisting of almost 150 words, states the date, location, participants and the circumstances surrounding the event upon which the district bases one of its charges against Mr. Kinsella. That allegation, involving a student named Steven Ulmer, received only fleeting reference in the Panel Report prepared by the Tenure Hearing Panel:*

> "These intense outbursts have occurred within the past few years with the latest, the Steven Ulmer incident, by far the most physically severe and potentially harmful." (A-175).

---

*The report that was prepared after the completion of a hearing extending over four days and reduced to over seven hundred pages of transcript, a copy of which was supplied to Judge Curtin in connection with these motions.

In United States v. Merz, 376 U.S. 192, (1964), a case specifically and directly relied upon by the Kinsella Court, (A-146) the Supreme Court stated:

> "Conclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the Commissions took through the maze of conflicting evidence. See United States v. Lewis, 308 F. 2d 453, 458 (376 U.S. 198)."

It is submitted that the Panel Report consists not mainly of conclusory findings, but exclusively of such conclusory findings. However, the injunction against conclusory findings exists for the purpose of providing an appellate tribunal with the basis for determining the line of reasoning used by the finders of facts in reaching a conclusion. Since the Panel Report is only a recommendation to the Board of Education which is the ultimate finder of fact in this case, it is instructive to review what the Board of Education in its determination said with respect to the Ulmer incident:

> "On February 23, 1973, Mr. Kinsella did grab and strike Steven Ulmer. This action also represented an excessive use of physical force." (A-179).

It is obvious that the Board of Education failed to use any more specificity than did the Hearing Panel in preparing

its findings. No reasoning is provided, nor are there any factual or credibility resolutions contained within the determination. While it is true that the findings of fact and conclusions thereon need not rise to the level of judicial astuteness, it has been recognized by the Supreme Court that even laymen are able to, and in fact by reason of the requirements of due process, are required to provide sufficient explication in order to comply with constitutional due process requirements.

> "The commissioners need not make detailed findings such as judges do when they try a case without a jury. Commissioners, we assume, will normally be laymen, inexperienced in the law. But laymen can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked. Such a requirement is within the competence of laymen; and laymen, like judges, will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it." Id. 634-635. (Emphasis added.)

It is submitted that at least with respect to specification No. 1 there is a failure to provide an appropriate record as required by due process generally, and as specifically mandated by the three-judge federal panel decision which is res judicata and the law of this case.

With respect to Specifications 2 and 3 of the charges, the Panel Report and the Board Determination are as vague as Charge No. 1. Charge No. 4 is one of insubordination. The only reference within the Panel Report that seems to relate to the charge of insubordination (although neither Charge No. 4 nor the term insubordination appears in the Panel Report) is the following:

> "The fact that this incident (the Steven Ulmer incident) occurred after Mr. Kinsella had been suspended without pay for a previous incident, provides ample evidence of a worsening condition needing immediate remedial attention." (A-175).

The Board of Education determination (A-179) is totally devoid of any reference either to insubordination or Charge No. 4. The determination of the Board of Education does contain a generalized paragraph referring vaguely to "these actions" (seemingly referring to the incidents alleged in Specifications 1, 2 and 3), and inferring incompetence, concluding "improper conduct", and alluding to a prior instance of discipline. Yet, when compared to the tests as set forth in United States v. Merz, supra, and the require-

ments of due process found by the three judge panel, the determination provides little, if any, of the insight needed to "demonstrate compliance with this elementary requirement [of due process]." See Kinsella v. Board of Education, 378 F. Supp. 60, quoting Goldberg v. Kelly, 397 U.S. 254, (1970).

It is submitted that there has been a demonstrable lack of due process as required by the United States Constitution. The denial of due process to Mr. Kinsella is a wrong which is properly before the United States District Court for the Western District of New York, and, based upon the facts before the court, supplementary relief was appropriate in this case. This entitlement to minimal due process is even more apparent upon analysis of a situation where fewer due process rights attach, that of a prisoner. In Haymes v. Regan, ____ F. 2d ____, (N.Y.L.J. November 19, 1975 (2d Cir., 1975)), this Court stated:

> "To satisfy fundamental due process requirements ... the statement of reasons should enable the reviewing body to determine whether parole has been denied for an impermissible reason, or indeed, for no reason at all. ...Moreover, it must provide the inmate with both the grounds for the decision to deny him parole and the essential facts from which the Board's inferences have been drawn.

Mr. Kinsella is entitled to no less. In fact, since it has been recognized that "The State of New York is quite protective of the rights of tenured teachers and supervisors"

(Fuentes v. Roher, 518 F. 2d 379 (2nd Cir., 1975)), it is submitted that Mr. Kinsella is entitled to many more due process rights than a prisoner would be. As amply demonstrated above, there has been an impermissible unconstitutional violation of Mr. Kinsella's due process rights, and he is entitled to relief based upon the decision of the three judge panel.

The adequacy and sufficiency of the Board of Education determination with respect to the hearing before the Hearing Panel raises a number of other constitutional questions. Specifically, the preordained bias of the Board of Education, the multiple role of the Board of Education and its attorney, and the fact that the hearing is not before the ultimate decision-maker, have been explored in the Briefs presented to the District Court, and, to prevent unnecessary duplication of matters discussed elsewhere (see A-259, infra) and in the interest of brevity, they will not be discussed at length in this brief.

Bound up in the complex question of due process is the weight given to the determination of the Hearing Panel. The Hearing Panel, a body external to the Board of Education, and organized exclusively to hear the facts of the matter, would seem to be an ideal body upon which to place the burden and responsibility of decision-making. If that were the case, the body hearing all of the facts and making

the credibility resolutions, as only a fact-finder hearing and seeing the witnesses first-hand can, would be the body making the ultimate determination. As a result, the person whose liberty and property interests are at stake would have a hearing and an opportunity to present a case before the ultimate decision-maker. In fact, that is what is the case under the Lloyd LaFolette Act which was found constitutional in Arnett v. Kennedy, 416 U.S. 134 (1974).

In the instant case, it is a strange anomaly, but factually correct, that the body which hears the facts and is in the best position to make credibility determinations is not the ultimate decision-maker, while the board of education which has never heard or seen the evidentiary facts first-hand or heard or seen the entire case first-hand, ultimately decides the issues while having the option of ignoring the Panel Report. While under this statutory scheme it is hoped that the Hearing Panel's Report will be given "some weight" (see Hodgkins v. Board of Education, ____ A.D. 2d ____, ____ N.Y.S. 2d ____ (3rd Dept., 1975, Decision 24910, decided December 18, 1975, wherein the Court found the Panel Report to be a part of the "record"), there is neither any statutory nor regulatory requirement that the Panel Report be given any weight whatsoever! The procedure followed pursuant to Education Law §3020-a is riddled with anomalies. This situation promotes the

possibility of bias and ex parte information being procured, solicited and employed by a vindictive Board of Education eager to place the stamp of legitimacy upon that which may not be proper. It is submitted that this situation discourages, rather than promotes, the interests of due process.

The District Court decision with respect to Motion II is based upon two conclusions. First, the District Court stated that Arnett requires no more due process than that afforded Mr. Kinsella, and, therefore, no substantial federal question was raised. Second, the court held that the inadequacy of the board determination was not a substantial federal question. With respect to the first conclusion, the Plaintiff takes exception to the favorable comparison between Arnett and the Kinsella facts. A complete discussion of the differences may be found in the brief submitted to the District Court (A-259, infra). Simply stated, in Arnett there is a due process hearing before an impartial decision maker. In Mr. Kinsella's case, no hearing was ever held before an impartial decisionmaker.

With respect to the second contention, as indicated above, the finding of a due process violation by the three judge panel should be considered as conclusive on the question of federal substantiality.

Finally, the District Court determined that there was no need for a three judge panel to be convened. As seen

by the arguments presented above, a substantial federal question exists: i.e., 1) the current status of an injunction against a state statute, and 2) the extent of due process to be afforded Mr. Kinsella. A three judge court may have been necessary to consider these issues (see discussion of the need to reconvene a three judge panel at A-223, infra).

CONCLUSION

The motions brought on behalf of the plaintiff seeking a clarification of the injunctive relief previously granted to the plaintiff in this action against the defendants was properly before the United States District Court for the Western District of New York. With respect to Motion I, the District Court should have entertained the motion and reached a determination clarifying the current status of the injunction granted by the three judge federal panel. With respect to Motion II, the District Court should have sought, if it thought it necessary, the convening of a three judge federal panel to consider the due process issues raised by Mr. Kinsella in his complaint in light of the hearing held in conformity with the statute in question, as modified by the amendatory Rules and Regulations, and in light of the determinations reached subsequent to the holding of the hearings.

As a result, this Court is respectfully requested to reverse the order and judgment dismissing each of the two motions and remand these matters to the United States District Court for the Western District of New York for the purpose of entertaining substantively the motions for supplemental relief in accordance with any decision and direction of this Court.

Respectfully submitted,

BERNARD F. ASHE, ESQ.
IRA PAUL RUBTCHINSKY, ESQ.
Attorneys for Appellant
80 Wolf Road
Albany, New York 12205
Tel. No. 518-459-5400

Dated: February 12, 1976

IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

E[illegible]WALD M. KINSELLA,

Appellant,

-against-

: AFFIDAVIT OF SERVICE BY MAIL

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONOWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

: Index No. 75-7652

Appellees.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

SUSAN J. NEARY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 920 Kings Road, Schenectady, New York.

That on the 12th day of February, 1976, deponent served two copies of the within Brief upon Thomas L. David, Esq. at 26th Floor, Main Place Tower, Buffalo, New York; James S. McAskill, Esq. at 1800 Liberty Bank Building, Buffalo, New York; and Louis J. Lefkowitz, Attorney General of the State of New York, Department of Law at Two World Trade Center, New York, New York 10047, the addresses designated by said attorneys for that purpose by depositing a true copy of same by Certified mail, return receipt requested, enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Susan J. Neary

Subscribed and sworn to before
me this 12th day of February, 1976

Patricia A. Shelli
Notary Public

PATRICIA A. SHELLI
Notary Public, State of New York
Qualified in Albany County
Commission Expires March 30, 19...77